IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 19 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VAISHALI ENTERPRISE

Versus

DEPTT. OF TELECOMMUNICATION

Appearance:

MR BS PATEL for Petitioner

MR AKSHAY H MEHTA for Respondent No. 1, 2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

Date of decision: 15/09/2000

ORAL JUDGEMENT

1. This is an application under Section 11 of the Arbitration and Conciliation Act seeking reference of disputes arising between the parties in terms of Arbitration Clause 25 of the agreement to an Arbitrator

to be appointed by me.

2. The petitioner was awarded civil work of construction of 20 KE-10-B Exchange Building at Pani Gate SH Building portion and Services, by the respondent Telecommunication Department of Union of India. On completion of work, the petitioner contractor submitted his final bill but he was not paid the full amount. By letter dated 25-2-2000, the petitioner raised his claims and requested for payment on or before 15-3-2000 failing which it was said that the contractor would be free to seek appointment of arbitrator. Along with the letter were sent several annexures containing calculations and details of the outstanding payments. As no payment of the claims was made on or before 15-3-2000, the petitioner contractor sent another letter dated 17/27-3-2000 informing the Department that for want of communication it would now proceed for seeking appointment of arbitrator. Second letter by the contractor was sent on 18/27-3-2000 calling upon the Department to appoint an arbitrator in terms of clause 25 of the agreement. The said letter invoking arbitration clause also contained an annexure containing the details of the claim. The above letter was replied by the Department by its letter dated 10-5-2000 informing the contractor that along with the letter invoking arbitration clause the annexure containing the details of claim has not been duly authenticated. Along with the letter the Department sent a proforma prescribed for seeking appointment of arbitrator. It was clearly informed in the said letter that if the contractor sends no reply by 19-5-2000 it would be presumed that unauthenticated claims in annexure would hold good.

2. It may however be mentioned that prior to the above letter dated 10-5-2000 the Executive Engineer In Charge by his letter dated 5-4-2000 had denied sustainability of the claim lodged by the contractor. The said letter was also replied by the contractor on 8-4-2000 refuting the allegations that the claims are not not sustainable. After dispatch of letter dated 8-4-2000, this application was filed on 24-4-2000 on which notice was issued by this Court on 28-4-2000 returnable on 16-6-2000. Since, however, as the Department had sent a letter on 10-5-2000 calling upon the contractor to send authenticated claims in the prescribed form before 19-5-2000 failing which the very claims will be treated as claims submitted by the contractor, the Department in terms of the above mentioned letter made an order of appointment of sole arbitrator Shri S. Kadirvalen, Chief Engineer, MTNL,

Mumbai on 30-5-2000. Before the appointment and after receipt of letter dated 10-5-2000 of the Department, the Contractor on 18-5-2000 wrote that since the Department failed to appoint the Arbitrator within the notice period of 30 days given by the contractor and the contractor having already approached the High Court on which notice was made returnable on 16-6-2000, the Department had no power or jurisdiction to appoint an Arbitrator in terms of arbitration clause 25.

3. It is on the above facts, that the learned counsel appearing for the petitioner insists that it is for me in exercise of my powers under Section 11(6) of the Act to appoint an independent arbitrator and name of a retired Judge of this Court has been suggested on behalf of the contractor petitioner.

4. The learned counsel appearing for the Department opposes the prayer stating that under Section 11(6) of the Act, there is no time limit fixed for making appointment of an arbitrator. The procedure of appointment is laid down in the arbitration clause itself. On behalf of the Department it is further submitted that the arbitration clause was invoked by the contractor but it was not in prescribed form and did not contain authenticated details of claims. The Department, therefore, called upon the contractor to submit the same in authenticated form and despite the failure of the contractor it has appointed the arbitrator. It is prayed that this Court should accept it as a valid appointment under the arbitration clause and reject the application for appointment of any other person as arbitrator.

5. The only ground that has been urged before me is that the Department has lost its power to make an appointment of arbitrator in accordance with the procedure prescribed in clause 25 of the agreement and this Court alone can now exercise the power of appointment.

6. I have gone through the terms of arbitration clause 25 under which the parties have agreed for appointment of `Chief Engineer, Telecommunications, or Civil Engineer in charge of the work at the time of dispute or if there be no Chief Engineer, the Administrative Head of the said Telecommunications Department' as the sole arbitrator to be appointed in this event of dispute. The other relevant term of clause 25 reads :

"It is also the term of the contract that the

party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes."

7. From the above portion of clause 25 it is clear that the Department was justified by its letter dated 10-5-2000 in insisting on the contractor that he should authenticate his claim submitted in the annexures for their reference to the arbitrator.

8. The main contention advanced on behalf of the contractor is that in his notice invoking arbitration clause the contractor had given a 30 days' period to the Department for appointment and the failure of the Department to appoint arbitrator, now takes away its right to make an appointment in terms of clause 25 of the agreement. Reliance is placed on decision of a learned Single Judge of Bombay High Court in case of Naginbhai C. Patel v. Union of India 1999(2) Arbitration Law Report 343. After hearing the learned counsel for the parties and after perusing the judgment cited before me I am of the considered opinion that in this case no exception can be taken to the appointment of arbitrator by the Department, and this Court will be justified in refusing to appoint any other arbitrator to substitute the arbitrator already appointed by the Department.

9. The distinction between various subsections of Section 11 of the Act is to be noticed. Where in the agreement there is no procedure of appointment laid down although there is an arbitration clause and on service of 30 days notice the other party fails to make an appointment, approach can be made to the Chief Justice for appointment of an arbitrator. This is the procedure indicated in Section 11(4)(a). Similarly under subsection (5) of Section 11, after serving 30 days notice in a case where there is agreement for appointment of sole arbitrator and the party noticed fails to agree for appointment, approach can be made for appointment to the Chief Justice. Under Sub-section (6) of Section 11, however, where the arbitration clause contains an agreed procedure for appointment of arbitrator, the position is different. In such case covered by subsection (6) of Section 11 where one of the parties fails to act as per the procedure prescribed, any of the parties may approach the Chief Justice "to take necessary measures" for appointment of an arbitrator. What is to be noticed in subsection (4) and subsection (5) is that there is a time limit of 30 days prescribed for taking action on notice

served by one party to the other. But no such time limit is fixed under subsection (6) of Section 11.

10. In the present case, a notice invoking arbitration clause having been received by the Department, the Department merely wrote back to the contractor to authenticate his claims in the annexure for making a reference to the arbitrator. In the mean time, the contractor had approached this Court but before notice on the said application could be served on the Department, in accordance with its letter dated 10-5-2000, despite non-submission of authenticated claims, the Department has by letter dated 30-5-2000 made the appointment of Chief Engineer as arbitrator in accordance with clause 25 of the agreement. In the absence of prescription of any time limit in subsection (6) of Section 11, on service of notice by one party to the other party the latter party is expected to take action within a reasonable period for making appointment in accordance with agreed procedure. As held by the learned Single Judge in the Bombay case of Naginbhai C. Patel (supra), the other party on service of notice is expected to act within a reasonable length of time and 30 days may be taken to be a reasonable length of time but it will depend upon the facts and circumstances of each case. In the instant case on receipt of notice invoking arbitration clause, the Department never refused to act in accordance with the procedure, but merely demanded authenticated claims from the contractor in the prescribed proforma, being the laid down procedure for reference of specific disputes to the arbitrator. It may not, therefore, be held that the Department was guilty of any unreasonable delay in making the appointment. It cannot also be held that there was any intention to frustrate the proceedings of this Court, because the appointment has been made strictly in terms of arbitration clause 25 and before service of notice on this application filed before me.

11. Learned counsel for the contractor then submitted that the contractor would insist on appointment of an independent arbitrator instead of a departmental Engineer.

12. On behalf of the Department it has rightly been stated that the parties having agreed to adopt the internal machinery of arbitration through the Departmental Head with a view to avoid inconvenience and undue expenditure to the parties, appointment of a retired High Court Judge would involve parties into avoidable expenditure. So far as the independence of the

arbitrator is concerned although he is Departmental Head, it is not open to the contractor to question his independence as arbitration through Departmental Head or representative was accepted by the contractor under clause 25. Merely because the arbitrator is of the Department, it cannot be held that he would not act independently in taking a decision on the disputes. The Supreme Court in Secretary to Government, Transport Department vs. Munuswamy AIR 1988 SC 2232 on similar objection observed thus:

> "This Court in International Airport Authority of India v. K.D. Bali, (1988) 2 JT 1 : (AIR 1988 SC 1099) held that there must be reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator, Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator."

13. We do not find that there is any apprehension or likelihood of bias or partisan attitude on the part of the Departmental Engineer. He is expected to act fairly, reasonably and independently.

14. In the considered opinion of this Court, as strictly in terms of arbitration clause 25 and provisions of subsection (6) of Section 11, the Department has already appointed an arbitrator, it is not necessary for me to make any appointment to substitute him. The appointment of sole arbitrator, namely, T.S. Kadirvalen, Chief Engineer BW MTNL Mumbai made by letter dated 30-5-2000 of the Department is upheld as valid being in accordance with law.

The application is disposed of with directions to the appointed arbitrator to issue formal notice to the parties and adjudicate upon the claims. He shall make a reasoned award.

(D. M. DHARMADHIKARI, C.J.)

[sndevu]